

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO
3

4 UNITED STATES OF AMERICA,
5

6 Plaintiff
7

8 v. [2] JOSÉ A. IRIZARRY-TORRES,
9

Defendant

CRIMINAL 08-175 (ADC)

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11 MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
RE: RULE 11(c)(1)(A) & (B) PROCEEDINGS (PLEA OF GUILTY)

12 I. Personal Background
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14 On May 7, 2008, José A. Irizarry-Torres, the defendant herein, was charged
15 in a seven-count indictment. He agrees to plead guilty to count one of the
16 indictment.

17 Count one charges that from a date unknown, but no later than in or about
18 the year 2005, and continuing up to and until the return of the instant indictment,
19 that is, May 7, 2008, in the Municipality of Ponce, District of Puerto Rico, and
20 within the jurisdiction of this court, José A. Irizarry-Torres, and other persons, did
21 knowingly and intentionally conspire, combine, and agree with each other and with
22 diverse other persons known and unknown to the Grand Jury, to commit an offense
23 against the United States, that is, to knowingly and intentionally possess with intent
24 to distribute and/or to distribute controlled substances, to wit: in excess of one
25 kilogram of heroin, a Schedule I, Narcotic Controlled Substance; and/or in excess of
26 50 grams of cocaine base, a Schedule II, Narcotic Controlled Substance; and/or in
27 excess of five kilograms of cocaine, a Schedule II, Narcotic Controlled Substance;
28 and/or in excess of 100 kilograms of marijuana, a Schedule I, Controlled Substance;

1 CRIMINAL 08-0175 (ADC)

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3 within 1,000 feet of the real property comprising a public or private school, as
4 prohibited by 21 U.S.C. §§ 841(a)(1) and 860. All in violation of 21 U.S.C. § 846.

5 The United States and the defendant stipulated for purposes of this agreement
6 that this defendant shall be accountable for conspiring to possess with the intent to
7 distribute at least 35 grams but less than 50 grams of cocaine base.

8 II. Consent to Proceed Before a Magistrate Judge

9 On November 3, 2008, while assisted by Francisco Adams Quesada, Esq., the
10 defendant, by consent, appeared before me in order to change his previous not guilty
11 plea to a plea of guilty as to count one of the indictment.

12 In open court the defendant was questioned as to the purpose of the hearing
13 being held. The defendant responded that the purpose of the hearing was to plead
14 guilty. The defendant was advised of his right to have all proceedings, including the
15 change of plea hearing, before a United States district judge. Defendant was given
16 notice of: (a) the nature and purpose of the hearing; (b) the fact that all inquiries
17 were to be conducted under oath and that it was expected that his answers would
18 be truthful (he was also explained that the consequences of lying under oath could
19 lead to a perjury charge); and (c) his right to have the change of plea proceedings
20 presided over by a district judge instead of a magistrate judge. The defendant was
21 also explained the differences between the appointment and functions of the two.
22 The defendant consent to proceed before this magistrate judge.

23 III. Proceedings Under Rule 11, Federal Rules of Criminal Procedure

24 A. Compliance With Requirements Rule 11(c)(1)

25 Rule 11 of the Federal Rules of Criminal Procedure governs the
26 acceptance of guilty pleas to federal criminal violations. Pursuant to
27 Rule 11, in order for a plea of guilty to constitute a valid waiver of the
28 defendant's right to trial, guilty pleas must be knowing and voluntary:
"Rule 11 was intended to ensure that a defendant who pleads guilty
does so with an 'understanding of the nature of the charge and

1 CRIMINAL 08-0175 (ADC)

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3 consequences of his plea.’’ United States v. Cotal-Crespo, 47 F.3d 1, 4
4 (1st Cir. 1995) (quoting McCarthy v. United States, 394 U.S. 459, 467
5 (1969)). [There are three core concerns in these proceedings]: 1)
6 absence of coercion; 2) understanding of the charges; and 3) knowledge
of the consequences of the guilty plea. United States v. Cotal-Crespo, 47
F.3d at 4 (citing United States v. Allard, 926 F.2d 1237, 1244-45 (1st
Cir. 1991)).

United States v. Hernández-Wilson, 186 F.3d 1, 5 (1st Cir. 1999).

In response to further questioning, defendant was explained and he
understood that if convicted on count one, based on the amount of narcotics
stipulated between the parties, he may be sentenced to a minimum term of
imprisonment of five years and a maximum of 80 years, a fine not to exceed
\$2,000,000, and a term of supervised release of at least eight years.

Defendant shall pay a special monetary assessment of \$100, per offense of
conviction, pursuant to 18 U.S.C. § 3013(a).

The defendant is aware that the court may order him to pay a fine sufficient
to reimburse the government for the costs of any imprisonment, probation or
supervised release; that the court may impose restitution to the victim; and that as
part of this plea agreement, if the court do impose restitution, the defendant agrees
to produce complete information regarding all restitution victims and defendant
agrees to execute a financial statement to the United States.

Defendant was advised that the ultimate sentence was a matter solely for the
court to decide in its discretion and that, even if the maximum imprisonment term
and fine were to be imposed upon him, he later could not withdraw his guilty plea
if he was unhappy with the sentence of the court. The defendant understood this.

Defendant was explained what the supervised release term means. It was
emphasized that cooperation with the United States Probation officer would assist
the court in reaching a fair sentence.

1 CRIMINAL 08-0175 (ADC)

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Emphasis was made on the fact that at this stage, no prediction or promises as to the sentence to be imposed could be made by anyone. Defendant responded to questions in that no promises, threats, inducements or predictions as to what sentence will be imposed have been made to him.

B. Admonishment of Constitutional Rights

To assure defendant's understanding and awareness of his rights, defendant was advised of his right:

1. To remain silent at trial and be presumed innocent, since it is the government who has the burden of proving his guilt beyond a reasonable doubt.

2. To testify or not to testify at trial, and that no comment could be made by the prosecution in relation to his decision not to testify.

3. To a speedy trial before a district judge and a jury, at which he would be entitled to see and cross examine the government witnesses, present evidence on his behalf, and challenge the government's evidence.

4. To have a unanimous verdict rendered by a jury of twelve persons which would have to be convinced of defendant's guilt beyond a reasonable doubt by means of competent evidence.

5. To use the subpoena power of the court to compel the attendance of witnesses.

Upon listening to the defendant's responses, observing his demeanor and his speaking with his attorney, that to the best of counsel's belief defendant had fully understood his rights, it is determined that defendant is aware of his constitutional rights.

1 CRIMINAL 08-0175 (ADC)

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C. Consequences of Pleading Guilty

Upon advising defendant of his constitutional rights, he was further advised of the consequences of pleading guilty. Specifically, defendant was advised that by pleading guilty and upon having his guilty plea accepted by the court, he will be giving up the above rights and would be convicted solely on his statement that he is guilty.

Furthermore, the defendant was admonished of the fact that by pleading guilty he would not be allowed later on to withdraw his plea because he eventually might disagree with the sentence imposed, and that when he were under supervised release, and upon violating the conditions of such release, that privilege could be revoked and he could be required to serve an additional term of imprisonment. He was also explained that parole has been abolished.

D. Plea Agreement

The parties have entered into a written plea agreement that, upon being signed by the government, defense attorney and defendant, was filed and made part of the record. Defendant was clearly warned and recognized having understood that:

1. The plea agreement is not binding upon the sentencing court.

2. The plea agreement is an "agreement" between the defendant, defense attorney and the attorney for the government which is presented as a recommendation to the court in regards to the applicable sentencing adjustments and guidelines, which are advisory.

3. The agreement provides a sentencing recommendation and/or anticipated sentencing guideline computation, that can be either accepted or rejected by the sentencing court.

1 CRIMINAL 08-0175 (ADC)

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4. In spite of the plea agreement and any sentencing recommendation contained therein, the sentencing court retains full discretion to reject such plea agreement and impose any sentence up to the possible maximum penalty prescribed by statute.

5. The defendant understands that if the court accepts this agreement and sentences defendant according to its terms and conditions, defendant waives and surrenders his right to appeal the conviction and sentence in this case.

The defendant does not qualify for the Safety Valve provision.

E. Government's Evidence (Basis in Fact)

The government presented a proffer of its evidence with which the defendant basically concurred.

Accordingly, it is determined that there is a basis in fact and evidence to establish all elements of the offense charged.

F. Voluntariness

The defendant accepted that no leniency had been promised, no threats had been made to induce him to plead guilty and that he did not feel pressured to plead guilty. He came to the hearing for the purpose of pleading guilty and listened attentively as the prosecutor outlined the facts which it would prove if the case had proceeded to trial.

IV. Conclusion

The defendant, by consent, has appeared before me pursuant to Rule 11, Federal Rules of Criminal Procedure, and has entered a plea of guilty as to count one of the indictment.

After cautioning and examining the defendant under oath and in open court, concerning each of the subject matters mentioned in Rule 11, as described in the preceding sections, I find that the defendant José A. Irizarry-Torres, is competent

1 CRIMINAL 08-0175 (ADC)

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3 to enter this guilty plea, is aware of the nature of the offense charged and the
4 maximum statutory penalties that the same carries, understands that the charge is
5 supported by the government's evidence, has admitted to every element of the
6 offense charged, and has done so in an intelligent and voluntary manner with full
7 knowledge of the consequences of his guilty plea.

8 Therefore, I recommend that the court accept the guilty plea of the defendant
9 and that the defendant be adjudged guilty as to count one of the indictment. After
10 sentencing, the government will move the court to dismiss the remaining counts of
11 the indictment.

12 This report and recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B)
13 and Rule 72(d) of the Local Rules of Court. Any objections to the same must be
14 specific and must be filed with the Clerk of Court within five (5) days of its receipt.
15 Rule 510.1, Local Rules of Court; Fed. R. Civ. P. 72(b). Failure to timely file specific
16 objections to the report and recommendation is a waiver of the right to review by the
17 district court. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986).

18 At San Juan, Puerto Rico, this 6th day of November 2008.

20 S/ JUSTO ARENAS
21 Chief United States Magistrate Judge

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